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EQUAL EMPLOYMENT OPPORTUNITIES FOR WOMEN UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964; A MEMORANDUM ON POLICY FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION SUBMITTED...TO THE INTERDEPARTMENTAL COMMITTEE ON THE STATUS OF WOMEN AND TRANSMITTED WITH APPROVAL OF THE COMMITTEE.

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Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on account of sex, race, color, religion, or national origin. To achieve the great potential of Title VII for securing social and economic gains for women workers, as well as others, the law must be interpreted with wisdom and perspective, vigorously administered and enforced, and widely publicized. Because one-third of the national work force is women, one-tenth of all family-heads are women and nearly half of these earn less than $3,000 annually, unemployment rates are higher for women than men, and average earnings are less, and Negro women have been victims of both sex and race discrimination, assurance of equal employment opportunity is of direct and immediate concern. Reasons for not hiring women based on assumptions of comparative employment characteristics of women in general, assumptions of sex prejudice of clients, or stereotype characterizations are not bona fide occupational exceptions. Advertising which expresses sex preference or limitation is also unlawful except when the employer can show a bona fide occupational qualification. (FP)

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EQUAL EMPLOYMENT OPPORTUNITIES FOR WOMEN

UNDER TITLE VII OF THE

CIVIL RIGHTS ACT OF 1964

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
OFFICE OF EDUCATION

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A Memorandum on Policy for the Equal Employment Opportunity Commission Submitted by the Citizens' Advisory Council to the Interdepartmental Committee on the Status of Women and transmitted with the approval of the Committee

October 1, 1965

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Copies may be secured from the Women's Bureau, U.S. Department of Labor, Washington, D.C. 20210

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INTRODUCTION

The Interdepartmental Committee and Citizens' Advisory Council on the Status of Women were established by Executive Order No. 11126 of November 1, 1963, as amended by Executive Order No. 11221 of May 6, 1965. This action was taken after the President's Commission on the Status of Women had completed its work and made its report, American Women, to the President in October of 1963. One of the recommendations of the President's Commission on the Status of Women was the creation of the present cabinet-level Committee and Citizens' Council to facilitate the carrying out of the Commission's recommendations, to coordinate the relevant activities of the Federal government, and to provide continuing leadership in advancing the status of women.

The Council is specifically directed by E.O. 11126 to "consider the effect of new developments on methods of advancing the status of women and recommend appropriate action" to the Interdepartmental Committee on the Status of Women. Many of the members of the Committee and Council also served on the President's Commission on the Status of Women.

At its meeting on July 28, 1965, the Council considered the potential impact on the status of women of the provisions of Title VII of the Civil Rights Act of 1964. Title VII contains a specific prohibition against discrimination in employment on account of sex and thus falls within the specific area of concern of the Citizens' Advisory Council on the Status of Women.

In a democracy, we are committed to the elimination of discrimination in all aspects of American life. The Council is deeply concerned, therefore, that equal employment opportunity for all workers without regard to race, color, religion, sex, or national origin be fully realized. The Council considers Title VII a congressional mandate for full economic opportunity for women. In order to achieve the great potential of Title VII for securing social and economic gains for women workers as well as for other groups covered by the law, it must be interpreted with wisdom and perspective and must be vigorously administered and enforced.

Members of State Commissions on the Status of Women held a two-day meeting July 29-30, in Washington, D.C. The implementation of Title VII was placed first by these spokesmen from 49 states, as the current topic of greatest concern. The Chairman of the Equal Employment Opportunity Commission, the Honorable Franklin D. Roosevelt, Jr. and Commissioner Eileen Hernandez were heard as speakers, with obviously intense interest by the over 300 attending men and women, following their welcome by the President of the United States. The Council is also aware of the strong concern of other organizations on this subject.

It is the purpose of this statement to set forth the views of the Council on some of the issues which have arisen or are likely to arise with respect to women in employment under Title VII. The Council earnestly urges that these views be given early consideration by the Equal Employment Opportunity Commission and hopes that they will prove helpful and contribute to action by the Commission in formulating its guidelines for carrying out its responsibilities under the law.

This memorandum does not, of course, cover all the issues concerning women in employment which may be raised by Title VII. The Council will expect to develop additional views as the need and opportunity occur. It stands ready to be helpful, and is hopeful of being consulted and called upon in considering the problems which will inevitably arise in this great area of mutual commitment to opening wide the doors of opportunity in employment.

The Interdepartmental Committee has approved this memorandum. The Attorney General abstained, considering it inappropriate to express a view on issues which might be the subject of litigation.

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The Need for a Positive Approach

The number and proportion of women in the labor force has increased steadily during the past 50 years. The percentage of working women who are married has also increased. The average period spent in the labor force has been lengthened and the range of jobs open to women has greatly expanded. Today, more than one-third of the nation's working force is comprised of women.

One-tenth of all family heads are women and nearly half of these have an annual income of less than $3000. About two-fifths of the white families and nearly three-fourths of the nonwhite families headed by women live in poverty. The unemployment rate is generally higher for women than for men. The average annual earnings for full-time year-round employment for women is lower than for men in all industries. Although the lower economic status of working women cannot be entirely attributed to sex discrimination, these facts do demonstrate that equal employment opportunity without discrimination on the basis of sex is of direct and immediate concern to women.

The recent concentration, on the part of the press, on various odd hypothetical cases which have no bearing on the real problems of sex discrimination fosters an attitude that the whole subject is one which should be taken lightly and invites acceptance of such an attitude by a disturbingly large segment of the public. The implications of such attitudes toward compliance with a Federal law are obvious. Unless the public is brought to understand that to deny a qualified woman a job simply because she is a woman is wrong, and that women have been and continue to be denied equal employment opportunity throughout the United States, the EEOC will be handicapped in achieving compliance with Title VII. Emphasis on the difficulties of interpreting the law also give the impression that enforcement may be delayed indefinitely and that compliance is not required.

The Council urges that the Commission utilize whatever resources and authority it has to educate the public toward acceptance of the law, to inform working women of their rights under the law and to adopt an affirmative and positive attitude of encouraging employers, employment agencies and unions to comply with the prohibitions against discrimination in employment.

A positive approach is especially important to Negro women who have been the victims of both race discrimination and sex discrimination. The unemployment rate is higher for Negro women than for any other group; the average earnings of Negro women are lower than those of any other group. The elimination of both race discrimination and sex discrimination will be necessary in order to provide equal employment opportunity for Negro women.

The Council believes that the anti-discrimination provisions of Title VII regarding sex can creatively reinforce those relating to race, color, religion and national origin. Our struggle against any one injustice need not dilute our efforts to eliminate the others. According broader employment opportunities for Negro men, for example, does not require the lessening of opportunities for women, including Negro women, but rather an expansion of opportunity for all.

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Bona Fide Occupational Qualification

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to refuse to hire or to discharge an individual or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's sex. It is also an unlawful employment practice for an employer to limit, segregate, or classify employees in any way which deprives an individual of employment opportunities or adversely affects his status as an employee because of such individual's sex. (Section 703(a)). Comparable provisions define unlawful employment practices of employment agencies and labor organizations. (Section 703(b) and (c)).

It is not an unlawful employment practice for an employer to hire and employ an individual on the basis of sex "in those certain instances where * * * sex * * * is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *." (Section 703(e)). This exception is also applicable with respect to religion and national origin, but not with respect to race or color. Of course, the burden is upon the party claiming this exception to prove that the specific employment requires a man or a woman as the case may be.

The Council believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Sex labels--"men's jobs" and "women's jobs"--deny employment opportunities to both sexes. The experience of the Federal government as an employer, as well as much of private industry, has demonstrated that there are very few jobs which cannot be effectively performed by qualified persons of either sex. In a Civil Service Commission sample survey made in 1963, out of 34,000 requests for candidates for new appointments from the Civil Service examination lists, only 40 specified sex.

The Civil Service Commission, in carrying out the Federal policy of equal employment opportunity without discrimination as to sex, found that it was helpful to specify some of the conditions which may not be used as a basis for excluding women from consideration for a position. (These are listed in the Federal Personnel Manual, pages 713-7 and 713-8). The Council believes that this may also be an effective way to approach compliance with Title VII. For example, guidelines interpreting the bona fide occupational qualification exception might advise employers that certain "excuses" for not hiring women will not be accepted by the EEOC as "bona fide occupational qualifications."

Emphasis on what is not a bona fide occupational qualification rather than what is a bona fide occupational qualification would help to avoid ridiculous hypotheticals such as male bunnies, male women's fashion models, etc. It would also help to clarify what should be regarded as discriminatory against women.

Reasons for not hiring women which may be offered by private employers from time to time and which the EEOC believes are not acceptable bona fide occupational qualifications might likewise form the basis for clarifying guidelines and would be helpful to other employers.

The Council would like to suggest, as a beginning, that the EEOC make clear that the following reasons for not hiring women, which are likely to be offered by some employers, do not come within the bona fide occupational exception.

1. The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that women are only temporary workers; the assumption that the turnover rate among women is higher than among men. Assumptions such as these are often found to be based on myths when actual comparisons are made with male employees in the same type and level of jobs. Even if it could be proved that women as a class are more likely to leave earlier, this would not justify pre-judging a particular individual because of class membership.

2. The refusal to hire a woman because of an assumption of sex prejudice on the part of the public, clients, customers, other employees or some other group which the employee will come in contact with. This likewise is an assumption which may well be false. Even if it could be proved to be true, it does not follow that the prejudice would affect the particular woman's performance of the job or that she would not be able to overcome the prejudice and change discriminatory attitudes.

3. The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include the following: women express their emotions differently than men; men are less capable of assembling intricate equipment; men are stronger than women; women have more endurance than men, etc. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally assigned to the group. This would not mean that a woman (of a man) who is not capable of doing heavy physical labor must be hired or employed in that kind of work.

None of the above three types of sex discrimination is relevant to the question of whether an individual is qualified for a particular job. In none of them does the Council believe that sex is "a bona fide occupational qualification reasonably necessary to the normal operation of [any] particular business or enterprise" as provided in section 703(e) of the Act.

Experience under Title VII will likely reveal other unjustifiable reasons for limiting employment opportunities on the basis of sex which should also be specifically rejected by the EEOC as not acceptable under the bona fide occupational qualification exception.

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Advertising

Under section 704(b) of the Act, it is an unlawful employment practice for an employer, labor organization or employment agency to publish any advertisement which indicates any preference, limitation, specification, or discrimination as to sex, with only one exception--when sex is a bona fide occupational qualification for employment.

The Council is alarmed at the lack of compliance with this provision as evidenced by the continued advertising in sex-segregated newspaper columns. Separate "help-wanted men" and "help-wanted women" columns in newspapers serve only to advise prospective job applicants not to apply where they are not wanted, thus perpetuating discrimination. Moreover, sex-segregated newspaper columns actually encourage employers to place a sex label on jobs,which unintentionally restricts the employment opportunities of both men and women.

The Council urges that the EEOC make clear to employers that the law prohibits placing an employment advertisement in a newspaper column which indicates a sex preference unless they can show that being a man or a woman as the case may be is a bona fide qualification for the job. The cooperation of the newspapers should also be sought. The Council believes that the adoption by the EEOC of a firm position on advertising would yield ready cooperation from the newspapers. The Phoenix Gazette and the Honolulu-Star-Bulletin, for example, no longer segregate their employment advertisements. (The advertising provisions in the Arizona and Hawaii fair employment laws are similar to the Federal law.) Where an employer can show that sex is a bona fide occupational qualification, the sex limitation could be expressed in the individual advertisement.

The discontinuance of sex-segregated newspaper columns would also help to eliminate sex discrimination in employment not covered by Title VII. Moreover, the lack of a strong Federal position on advertising may hamper effective implementation of advertising provisions of State fair employment laws which do not have numerical limitations of coverage.

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The Bennett Amendment

Section 703(h) of the Act provides, in part, that "It shall not be an unlawful employment practice * * * for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (the Equal Pay Act of 1963) (29 U.S.C. 206(d))." Senator Bennett had offered this language as an amendment to the civil rights bill as a "technical correction," for the purpose of providing "that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." (110 Cong. Rec. 13647, 88th Cong. 2d Sess., 1964).

It has been suggested that this provision be interpreted as limiting coverage of cases involving discrimination on the basis of sex in payment of compensation to those cases which are already covered by the equal pay provision of the Fair Labor Standards Act. The coverage of the Fair Labor Standards Act and the Civil Rights Act differs in several important respects. For example, executive, administrative and professional employees and employees of certain retail and service establishments are exempt from section 6(d) of the Fair Labor Standards Act by section 13 of that Act. (29 U.S.C. 213(a)). Thus, if the Bennett Amendment is regarded as limiting coverage of Title VII to the coverage of the Fair Labor Standards Act, women in these occupations would not be able to bring complaints of discrimination in pay. Such a result is clearly inconsistent with the basic purpose of Title VII to prohibit discrimination. It would also give the Bennett Amendment a drastic substantive effect which could hardly be considered a "technical correction," as stated by Senator Bennett.

The Equal Pay Act prohibits paying women or men at a rate less than the rate paid to employees of the opposite sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions * * *." Title VII does not contain any comparable standard for determining discrimination in compensation. A reasonable interpretation of the Bennett Amendment is one which would apply the standards of the Equal Pay Act applicable to cases involving discrimination in the amount of compensation which arise under Title VII. The Council supports this interpretation and opposes any interpretation which would limit the coverage under Title VII. We believe this interpretation is consistent with the basic purpose of Title VII. It would also avoid conflicting interpretations in cases covered by both the Civil Rights Act and the Equal Pay Act.

State Labor Standards Legislation

The President's Commission on the Status of Women made a number of recommendations concerning State labor standards legislation. These appear in its report, American Women, pages 35-39. As of September 1, 1965, Governor's Commissions on the Status of Women had been established in 45 States. It is hoped that action on the part of these State commissions will accelerate the progress in improving State labor standards laws for both men and women.

The Council continues to support the labor standards recommendations in American Women and supports the efforts of State commissions to seek enactment (or improvement) of State minimum wage and premium pay laws, applicable to both men and women, providing minimum wage levels approximating the minimum under the Fair Labor Standards Act and requiring premium pay at the rate of at least time and a half the worker's regular rate for overtime. State legislation limiting maximum hours of work should be maintained until such time as excessive hours for all workers are discouraged by adequate provision for premium pay. However, exemptions should be made for executive, administrative and professional women, since they frequently find that limitations on hours adversely affect their opportunities for employment and advancement.

It should also be noted that the Council continues to support the replacement of State laws providing restrictions on weight lifting and night work by more flexible regulations applicable to both men and women and administered by appropriate regulatory bodies.